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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1265

WILLIAM J. FROMBACH,

Petitioner,

v.

GILBERT ASSOCIATES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE.

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INDEX.

	Page
OPINIONS AND ORDERS OF THE COURTS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
The Application Below of the Delaware Saving Statute Violates the Privileges and Immunities and Equal Protection Clauses of the Constitution	6
1. The Privileges and Immunities Clause	7
2. The Equal Protection Clause	14
CONCLUSION	18
APPENDIX A—Constitutional and Statutory Provisions Involved	21
APPENDIX B—Opinion of the Superior Court for New Castle County	23
APPENDIX C—Order of the Superior Court for New Castle County, Denying Reargument	26
APPENDIX D—Certification by Superior Court to Supreme Court of Delaware on a Question of Law	27
APPENDIX E—Opinion of the Supreme Court of Delaware	31
APPENDIX F—Notice of Order of the Supreme Court of Delaware, Denying Rehearing	38
APPENDIX G—Judgment of the Supreme Court of Delaware	39

TABLE OF CASES CITED.

	Page
Blake v. McClung, 172 U. S. 239, 43 L. Ed. 432 (1898)	10, 13
Burnett v. New York Cent. R. Co., 380 U. S. 424, 13 L. Ed. 2d 941 (1965)	7, 17, 18
Chambers v. B. & O. R. R., 207 U. S. 142, 52 L. Ed. 143 (1907)	10, 11
Griffin v. Illinois, 351 U. S. 12, 17(n), 100 L. Ed. 891 (1956)	17
International Union, U. A. W. v. Hoosier Cardinal Corp., 383 U. S. 696, 16 L. Ed. 2d 192 (1966)	7
Toomer v. Witsell, 334 U. S. 385, 92 L. Ed. 1460 (1948)	8, 10
Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254 (1921)	15, 18

STATUTES CITED.

	Page
Delaware:	
Borrowing Statute, 10 Del. C. 8120	3, et seq.
Saving Statute, 10 Del. C. 8117(a)	3, et seq.
Statute of Limitation, 10 Del. C. 8118	3, et seq.
Pennsylvania:	
Limitation, 12 Purdon's Pa. Stat. Ann. 34	3, et seq.
United States Constitution:	
Article IV, Sec. 2	3, et seq.
Amendment XIV, Sec. 1, clauses 2 and 4	3, et seq.
Code:	
28 U. S. C., Section 1257	2

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GILBERT ASSOCIATES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, William J. Frombach, respectfully prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Delaware, entered in the above matter on November 29, 1967, reversing the order of the Superior Court for New Castle County, and directing dismissal of petitioner's action.

OPINIONS AND ORDERS OF THE COURTS BELOW.

The Opinion of the Superior Court for New Castle County, unreported, is printed as Appendix B hereto (p. 23). The Order of said Court denying reargument is printed as Appendix C (p. 26). The Certification by said Court to the Supreme Court of Delaware on a Question of Law is printed as Appendix D (p. 27). The Opinion of the Supreme Court of Delaware, reported at Del. , 236 A. 2d 363, is printed as Appendix E hereto (p. 31). The Notice of Order of said Court denying rehearing is printed as Appendix F hereto (p. 38). The judgment of said Supreme Court of Delaware is printed as Appendix G hereto (p. 39).

JURISDICTION.

The judgment of the Supreme Court of Delaware was entered on November 29, 1967 (p. 39). The Order denying rehearing was entered on November 28, 1967 (p. 38). On February 5, 1968, Mr. Justice William J. Brennan, Jr., entered an Order extending time for filing a petition for writ of certiorari herein to and including March 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257.

QUESTION PRESENTED.

A diversity suit brought in the Federal Court in Delaware, by a Pennsylvania citizen against a Delaware Corporation, upon a Pennsylvania cause of action, and timely under both Delaware and Pennsylvania law, was, after expiration of the limitation period, dismissed because the defendant's principal place of business was in Pennsylvania; and the plaintiff immediately instituted a new action in the Delaware State Court, where the limitation was pleaded. Was it not a violation of the Privileges and Immunities and the Equal Protection Clauses of the Constitution of the United States for the Delaware Court to refuse to said Pennsylvania plaintiff the benefit of the Delaware Saving Statute, which permits a party to commence a new suit within one year after a prior timely suit on the same cause has been dismissed other than upon the merits, where, in an action in the same court upon the same cause, the benefit of the Saving Statute would have been applied if plaintiff were a Delaware resident?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The provisions of the Constitution of the United States involved are: Article IV, Sec. 2, and Amendment XIV, Sec. 1, clauses 2 and 4.

The statutory provisions of Delaware involved are: Borrowing Statute, 10 Del. C. 8120; Saving Statute, 10 Del. C. 8117(a); Statute of Limitation, 10 Del. C. 8118. The statutory provision of Pennsylvania involved is: Statute of Limitation, 12 Purdon's Pa. Stat. Ann. 34.

STATEMENT OF THE CASE.

Petitioner, a resident of Pennsylvania, instituted an action in the United States District Court in Delaware, alleging serious personal injuries sustained as result of the negligence of respondent, a Delaware engineering corporation, while petitioner was working on a construction project in Pennsylvania. This action was timely under both Delaware and Pennsylvania limitations, which are two years. After extensive discovery proceedings by both parties, two years from the injury having expired, respondent moved to dismiss for lack of diversity jurisdiction, on the ground that respondent's permanent place of business was in Pennsylvania, where petitioner resided. The Federal action was therefore dismissed. Six days later, petitioner started suit in the Delaware State Court, claiming the benefit of the Delaware Saving Statute, 10 Del. C. 8117, which provides that where suit is timely begun and is dismissed other than on the merits, the plaintiff is allowed one year from the dismissal to bring another action. The lower Court held that this statute applied, and refused to dismiss, since the Federal Court action had been timely and was dismissed not on the merits, and the defendant was not prejudiced. Respondent's motion for reargument was denied. Thereupon, on motion of respondent, the issue was certified to the Supreme Court of Delaware.

The Delaware Supreme Court reversed, and dismissed the action, as barred by the limitation statute. The Court held that the Saving Statute did not apply to benefit this petitioner. Under the Court's reasoning, if petitioner had been a *Delaware* resident, the Delaware Saving Act *would* have applied; but since petitioner was a *Pennsylvanian*, it did *not* apply because Pennsylvania does not have a similar saving statute.

Petitioner thereupon filed a Petition for Rehearing with the Delaware Supreme Court, pointing out that the Court's decision denied to petitioner the benefit and protection of the Delaware Saving Act solely because he was a Pennsylvanian, and despite the fact that if he had been a Delaware citizen under identical facts, the Delaware statute would have applied. Petitioner pointed out that the decision discriminated against petitioner solely because he was from another state, and that this violated the privileges and immunities clauses and equal protection clause, Article IV, Sec. 2, and Amendment XIV, Sec. 1, Clauses 2 and 4, of the Constitution of the United States. Despite these clear violations of petitioner's Constitutional rights, the Delaware Supreme Court denied rehearing.

REASONS FOR GRANTING THE WRIT.

The Application Below of the Delaware Saving Statute Violates the Privileges and Immunities and Equal Protection Clauses of the Constitution.

Three questions were certified for decision to the Delaware Supreme Court, of which two are here relevant (29). The Court "assumed", without deciding, that the first question would be answered in the affirmative: that the Delaware Saving Statute *does* apply to a tort committed in Pennsylvania which has no equivalent Saving Statute, where suit was timely brought in a Federal Court in Delaware and dismissed after the limitation had run, for lack of diversity jurisdiction (34, 37). Under such view, it does not matter whether Pennsylvania has an equivalent saving statute. However, the Court answered the second question in the affirmative: that, although the right of action was preserved by the Saving Statute, the Delaware Borrowing Statute bars the action since it was instituted after the expiration of the two-year limitation of Pennsylvania, which has no applicable saving statute (34, 37). Thus, the Court below has applied the Borrowing Act to the Saving Act in such a manner as to make application of the latter statute depend upon whether or not the plaintiff was a resident of Delaware.

The Borrowing Statute provides a measure of limitation (here, the Pennsylvania two-year statute). Once suit was started in the Delaware Federal Court within that two years, the limitation was satisfied, and was no longer a consideration as to the instant cause of action. It is admitted that the Federal action brought by the plaintiff was timely, and the Court below has stated, in its opinion, that said Federal action was within the provisions of the Saving

Act, and that the reason for dismissal by the Federal Court was also within the purview of the Saving Act, as the type of action which the statute seeks to preserve (34). Six days after such dismissal, petitioner immediately instituted suit, upon the same cause of action, in the Delaware State Court; thus, doing everything possible to preserve the timeliness of his suit.[1] Therefore, the Saving Act, formulated for such a situation, should have been applied to preserve to petitioner his remedy in the Delaware State Court.

The Court's reasoning re-applies against the non-resident, the borrowed Pennsylvania limitation a *second* time, after it has already been satisfied in the same cause of action. This clearly violates the specific provisions of the Constitution that the citizens of each state are entitled to *all* privileges and immunities of those of the several states, and that a state may not deny to any person under its jurisdiction the *equal* protection of *all* of its laws. In refusing to the petitioner the benefit of the Saving Statute, the Court below has specifically discriminated against him solely because he is a Pennsylvanian, thus denying him equal access to the Courts of Delaware. This was a question of first impression in the Delaware Courts and review of this action is essential to prevent a compounding of this novel discrimination, which points at the heart of Federal diversity jurisdiction.

1. The Privileges and Immunities Clause.

The Constitution of the United States, Article IV, Section 2, provides that:

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1. See discussion of this significant factor by Mr. Justice Stewart, in *International Union, U. A. W. v. Hoosier Cardinal Corp.*, 383 U. S. 696, 708, 16 L. Ed. 2d 192, 201 (1966). See also, *Burnett v. New York Central R. Co.*, 380 U. S. 424, 428-30, 13 L. ed. 2d 941, 945-7 (1965), where this Court emphasized the liberality to be exercised in granting to a litigant his day in court where he "has not slept on his rights", but acted promptly after the first suit was dismissed.

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."

Amendment XIV, Section 1, Clause 2, provides that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."

This Court has made it clear that this section prohibits any discrimination by any state against citizens or residents of another state, based upon the fact of non-residence. In *Toomer v. Witsell,* 334 U. S. 385, 92 L. Ed. 1460 (1948), striking down a state's discriminatory license fee for fishing boats of non-residents, this Court said, concerning the "privileges and immunities" clause: (U. S. at 396, L. Ed. at 1471)—

"The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. *It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.* 'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' Paul v. Virginia, 8 Wall. (U. S.) 168, 180, 19 L. Ed. 357, 360 (1868)." (Emphasis supplied.)

Continuing, this Court pointed out that the clause is not "an absolute", but "it does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." (U. S. at 396, L. Ed. at 1471).

To the contention that a discriminatory statute is justified because of a possibly "proper purpose", this Court emphasized that even a legitimate end does *not* justify a means which "overlooks the purpose of that clause which . . . is to outlaw classifications based on the fact of noncitizenship unless there is something to indicate that noncitizens constitute a pecular source of the evil at which the statute is aimed." (U. S. at 398, L. Ed. at 1472). Such an evil does not exist in granting to this Pennsylvania petitioner his day in Court.

In the instant case, the Court below states that the justification for the residence exception to the Borrowing Statute, by reason of which the Saving Act relief was denied to plaintiff, is that the statute would prevent "forum shopping" (35). But, while the basic purpose of the Act may have been laudable, its use as a means to bar the equal application of a relief statute to a suit started before limitation had run does not serve this purpose;[2] in such application, it is a weapon of discrimination against plaintiff, *solely because of his non-residence.* The method here used "overlooks the purpose" of the Constitutional clause, which is to provide to *every* suitor within the jurisdiction of the state the *same* judicial relief, including, if provided to local residents, relief from a limitation if suit was once timely started and dismissed for other than the merits of the case. As applied by the Court below, the joint opera-

2. The purpose of preventing "forum shopping" as to any cause of action is served best by providing a "built-in" limitation within every statute granting a remedy for a right, so that the period for use of the remedy is self-executing within it, and necessarily follows the organic statute wherever it is pleaded.

tion of the two statutes in question gives only Delaware residents relief, to the exclusion of non-residents. The question of "forum shopping" is no longer an issue where the plaintiff already has started suit. The issue becomes the application of the Saving Act—a special privilege—which the Court below has limited to Delaware residents and denies to non-residents.[3]

As this Court said, in *Toomer:*

> ". . . We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them." (U. S. at 399, L. Ed. at 1473).

In *Chambers v. B. & O. R. R.*, 207 U. S. 142, 52 L. Ed. 143 (1907), this Court expressed the application of the privileges and immunities clause to the right of a non-resident to sue in the courts of a state, as follows:

> ". . . The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states *to the precise extent that it is allowed to its own citizens.* Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution . . ." (U. S. at 148, L. Ed. at 146) (Emphasis supplied.)

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3. In *Toomer,* this Court noted that although the statute is "couched in terms of residence", it is not outside the scope of the privileges and immunities clause, which speaks of "citizens" (U. S. at 397, L. Ed. at 1471-72). Similarly, *Blake v. McClung,* 172 U. S. 239, 247, 43 L. Ed. 432, 435 (1898).

This Court pointed out that each state may determine the limits of jurisdiction of its courts and the type of litigation that may be heard and may determine the extent to which it will entertain transitory actions which have arisen elsewhere—

> "But any policy the state may choose to adopt *must operate in the same way on its own citizens and those of other states.* The Privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is *void,* because in conflict with the supreme law of the land." (U. S. at 149, L. Ed. at 146) (Emphasis supplied.)

Chambers involved a death action brought by citizens of Pennsylvania in the Ohio court for death in Pennsylvania of a Pennsylvanian. The Ohio death statute provided only that where the death of a citizen of Ohio was caused by wrongful act in another state where a right to damages for death is provided, such right may be enforced in Ohio. There was no other right under Ohio law to sue for death occurring in another jurisdiction. After discussing the Constitutional demand for equality of treatment in the courts, as aforesaid, this Court noted that a discrimination was thus introduced into the law of the state, but that—

> ". . . The discrimination was based solely on the citizenship of the *deceased.* The courts were open in such cases to plaintiffs who were citizens of other states if the deceased was a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another state. So far as the parties to the litigation are concerned, the state, by its laws, made no discrimination based on citizenship, and offered precisely the same privileges to citizens of other states

which it allowed to its own. There is, therefore, at least a literal conformity with the requirements of the Constitution." (U. S. at 149-50, L. Ed. at 147) (Emphasis supplied.)

This Court thus made it clear that since the discrimination was based solely upon the citizenship of the deceased and *not* the citizenship of the *plaintiff*, there was no discrimination as to privileges to citizens of other states. But had the statute given rights to Ohio parties to the suit which were denied to parties from other states, then, obviously, the statute would have been unconstitutional. Upon this point, the Court said if a foreign statute should give the right of action for death to the deceased which would then survive to his representative, then it would be the right of action of the deceased which was brought into court, and that—

". . . as the test of jurisdiction is the citizenship of the person in whom the right of action was originally vested, and the action is entertained if that person was a citizen of Ohio and declined if he was a citizen of another state, there is, in a real and substantial sense, a discrimination forbidden by the Constitution." (U. S. at 150, L. Ed. at 147)

Concluding, this Court stated that *if* such a case should arise and be denied a hearing in the Ohio courts, then, "as the denial would be based upon the citizenship of that person in whom the right of action originally vested, it might be necessary to consider whether the Ohio law did not, in substance, grant privileges to Ohio citizens which it withheld from citizens of other states." (U. S. at 150, L. Ed. at 147).

Clearly, this Court there speaks of the situation which is now presented. The instant statutes, as they have herein

been applied by the Court below, discriminate against out-of-state citizens solely because of their citizenship, granting relief to Delaware suitors, and declining the same relief to Pennsylvanians. This is, "in a real and substantial sense, a discrimination forbidden by the Constitution".

It may be suggested that the position here taken would apply the privileges and immunities clause so as to prohibit the respective states from legislating even necessary or reasonable regulations required where a foreign citizen enters the state court. This is not so. This Court has expressed many situations where the forum state may and has every right to regulate the participation by foreign suitors in state courts. In *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432 (1898), Mr. Justice Harlan reviewed past decisions of the Court applying the privileges and immunities clause. While it has been consistently held that citizens of foreign states must be given the same rights as local citizens to institute and maintain actions in the courts of the state, there are proper regulations which may be made:

> ". . . For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a non-resident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. . . . The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the people of the

> United States, by and for whom the government of the Union was ordained and established." (U. S. at 256-57, L. Ed. at 438-39)

Under the reasoning of the Court below, if plaintiff had been a Delaware resident, the Delaware Borrowing Act proviso would have been used to apply the Delaware Saving Act to the remedy and thus *extend* the time to bring suit in the State Court. But, because plaintiff was a Pennsylvanian he has been denied the equal protection of the Delaware Saving Act, and is thus deprived of his right to redress for his serious injuries. This application of the Delaware Statutes in discrimination against this out-of-state suitor is in violation of the Constitution of the United States.

The Saving Act is, by its very nature, resorted to *only after* a limitation has expired and the remedy would otherwise be barred. There is no other rationale for its existence. If plaintiff were a Delaware resident, under the same facts, this Court would have afforded him the benefit of the Saving Act, although the tort occurred in Pennsylvania, in whose forum no saving statute would be applicable. However, because plaintiff is a Pennsylvanian, the Court below has refused to apply this benefit, on the wholly irrelevant ground that Pennsylvania does not have a similar saving statute. Thus, despite the identity of the cause of action, this procedural relief has been reserved only to the benefit of Delaware citizens. This denial to the Pennsylvania plaintiff is discriminatory and unconstitutional.

2. The Equal Protection Clause.

The Constitution of the United States, Amendment XIV, Section 1, Clause 4, provides that:

> ". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The same discrimination by the Court below, denying to a non-resident access to Delaware Courts, while granting access to Delaware residents under the identical circumstances, is also a direct deprivation of the equal protection of the laws of Delaware.

In *Truax v. Corrigan,* 257 U. S. 312, 66 L. Ed. 254 (1921), the Supreme Court recognized that the same failure of equality before the law and courts of any state that violates Article 4, § 2, similarly violates the equal protection clause of the 14th Amendment. Mr. Chief Justice Taft said (U. S. at 332-33, L. Ed. at 263):

> ". . . Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law;' 'This is a government of laws, and not of men;' 'No man is above the law,'—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.
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> "Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class.

"Mr. Justice Matthews, in Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. Ed. 220, 226, 6 Sup. Ct. Rep. 1064, speaking for the court of both the due process and equality clause of the 14th Amendment, said:

" 'These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*' "

Continuing its analysis of the equality provision of the 14th Amendment, this Court said (U. S. at 334-35, L. Ed. at 264):

"The 14th Amendment, as this court said in Barbier v. Connolly, already cited, intended 'not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

The refusal to the Pennsylvania plaintiff in this case of like access to the Courts of the State of Delaware as is afforded to the residents of Delaware is thus a direct violation of the equality provision of the 14th Amendment. It is clear that "equal protection of the laws" means equal access to the Courts under the laws. It also means an equality of *operation* of the judicial machinery in enforcement of the laws. A statute which may be non-discriminatory on its face may be grossly discriminatory in operation. *Griffin v. Illinois,* 351 U. S. 12, 17(n), 100 L. Ed. 891, 898 (1956). The application by the Court below of the Delaware statutes in question is clearly unconstitutional.

This Court has said:

> "Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342, 348-349, 88 L. ed. 788, 792, 64 S. Ct. 582. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his right." *Burnett v. New York Cent. R. Co.,* 380 U. S. 424, 428, 13 L. ed. 2d 941, 945 (1965).

In the instant case, respondent was fully aware of the claim. The Federal action had proceeded for one year, with service of process and intensive discovery, so that the respondent was not surprised or prejudiced by the institu-

tion of the State action six days after the Federal action was dismissed. Therefore, the essential reason for limitation does not here exist. Rather, petitioner should be given his day in court, in the interest of justice, as this Court has stated:

> "This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights. . . ." *Burnett, supra,* U. S. at 428, L. ed. at 945.

CONCLUSION.

Denial to the petitioner of the benefit of the Delaware Saving Statute deprived him of the equal protection of the law in that State and denied to him the privilege granted by that law, solely because he was not a resident. This denial and deprivation were not based upon any reasonably foreseen evil that might result from giving to petitioner access to the State's courts. The test of the classification was solely petitioner's residence. Since the basis of the suit was a common-law cause of action which arose in another state, there was no Constitutional justification to deprive a resident of that other state of his day in court. Reservation of one set of laws for residents and another set for non-residents is exactly what the authors of our Constitution sought to prevent, in their quest for a unified Federal Government, as opposed to a loosely connected group of sovereign states. As Chief Justice Taft said: "the equal protection of the laws is a pledge of the protection of equal laws" to all persons within the territorial jurisdiction of the state. *Truax v. Corrigan,* 257 U. S. 312, 333, 66 L. Ed. 254, 263 (1921).

The decision of the Supreme Court of Delaware upon this issue of first impression in that State results in a specific discrimination against a non-resident plaintiff, solely because of his non-residence, in violation of the Constitutionally guaranteed hospitality of one state to residents of another. This novel discrimination should be reviewed by this Court, and reversed and remanded for further proceedings.

Respectfully submitted,

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